Ombudsman
ONTARIO

Ombudsman Report

Investigation into closed meetings by Council for the Township of Adelaide Metcalfe in July and August, 2012

André Marin
Ombudsman of Ontario
March 2013

Complaint

1 Our Office received a complaint regarding the closed meeting practices of council for the Township of Adelaide Metcalfe. The complaint referred to closed meetings held on July 25, August 1, and August 13, 2012.

2 The complaint alleged that: (a) with regards to the July 25, 2012 meeting, the Township failed to provide sufficient information about the matter to be discussed in closed session; (b) the August 1, 2012 closed meeting was held without prior notice; and (c) there was no advance notice that a closed session would be held at the August 13, 2012 meeting.

Ombudsman jurisdiction

3 Under the *Municipal Act, 2001* (the "Act"), municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.

4 Citizens have the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.

5 My office is the closed meeting investigator for the Township of Adelaide Metcalfe by default.

6 In investigating closed meeting complaints, our Office considers whether the open meeting requirements of the Act, and the relevant municipal procedure by-law, have been observed.

Investigative process

7 After conducting a preliminary review of the initial complaints, on October 3, 2012, our Office notified the Township of Adelaide Metcalfe that we would be conducting an investigation.

8 During the course of our investigation, we obtained and reviewed relevant municipal documents, including motions, agendas, minutes, video recordings and notes. We also considered the municipality's procedure by-law, as well as the applicable legislation.

9 In accordance with s. 19(1) of the *Ombudsman Act*, members of council and Township staff are required to provide our Office with any documents or information requested during the course of our investigations. Council members and Township staff co-operated fully with our investigation.

10 A two-person team conducted 10 in person interviews with members of council and relevant municipal staff. A member of our Office also conducted telephone interviews with three relevant third parties regarding the July 25 meeting.

Preliminary report

11 In accordance with our normal procedures, the municipality was given an opportunity to review a report containing preliminary findings and analysis, and to make any relevant representations before the report was finalized. Council and staff had the option of receiving a copy of the preliminary report for review upon signing a confidentiality undertaking.

12 Four members of council and four members of staff were provided with the preliminary report on a temporary basis, after signing confidentiality undertakings. We received one written comment on the preliminary report, which was taken into account in finalizing this report.

Council meeting procedures

13 The Township's procedure by-law (#43-2012) states that regular meetings of council are held on the first and third Monday of each month at 7:00 p.m. Special meetings can be called with 24 hours notice to members of council. The by-law provides that the 24 hour notice may be altered or waived by consent of 2/3 of council. The Administrator/Clerk/Treasurer is required to provide notice of special meetings.

14 According to the procedure by-law, the Administrator/Clerk/Treasurer is responsible for preparing the agenda and the agenda for council meetings will,

"insofar as practicable", be made available to members the Thursday prior to a regular meeting. The procedure by-law does not specifically provide for public posting of agendas but the Clerk explained that their practice is to post the current agenda on the Township website the Friday prior to the meeting.

15 According to the procedure by-law, additions or amendments to the agenda may be added to the agenda by a resolution from council. The by-law does not refer to when in a meeting it is possible to add to, or amend, the agenda, however the Clerk advised that this normally occurs at the beginning of a meeting.

Investigative findings

16 As a result of our investigation, we have determined that council violated the open meeting requirements of the Act during each of the three meetings complained about (July 25, August 1 and August 13, 2012).

July 25, 2012 meeting

17 The July 25 meeting was a special council meeting. The agenda for the meeting was provided on the Township's website. It stated, with regards to the closed session:

> To discuss legal matters under Section 239(1)(f) of the Municipal Act to consider advice subject to Solicitor-Client privilege with respect to a future development in the Municipality of Adelaide Metcalfe.

18 The resolution to proceed *in camera* provided the same information as was included in the agenda.

19 During the course of our investigation we received some conflicting information as to what occurred during this meeting.

20 Some members of council and staff recalled that council met initially only with certain staff to review a site plan agreement and cost-sharing proposal of a local developer, Strathroy Gateway Properties Inc. ("Strathroy Gateway"). These interviewees recalled council reviewing and discussing the proposals as well as the legal advice provided to the municipality by its external solicitor. The

solicitor confirmed that he did not attend the meeting, but provided written advice prior to the meeting.

21 Estimates for the length of this portion of the meeting ranged from 20-35 minutes, after which some interviewees recalled that three representatives of Strathroy Gateway joined the meeting.

22 Other interviewees recalled that the representatives of Strathroy Gateway were in attendance for the entire meeting.

23 The meeting minutes indicate that the Strathroy Gateway representatives were in attendance, but do not record their arrival time. The notes kept by the Deputy Clerk indicate that the representatives arrived approximately 35 minutes after the meeting began.

24 All who attended the meeting stated that, while the representatives of Strathroy Gateway were in attendance, the *in camera* discussions involved negotiations and/or discussions about amending the draft site plan agreement and cost-sharing proposal. Certain of those interviewed recalled that the municipal solicitor's legal advice was discussed with the developer's representatives.

25 Interviewees stated that they believed these discussions were appropriate for a closed session because the site plan agreement had not been finalized, and because legal advice was discussed. All stated that no votes or directions to staff occurred in the closed session.

26 Upon returning to open session, the following motion was passed:

> Resolved that the closed session end and that Council reconvene and that staff be directed to prepare amendments to the Site Plan Agreement as discussed with Strathroy Gateway Properties Inc.

Analysis

27 The complaint my Office received was that the Township failed to provide sufficient information about the matter to be discussed in closed session.

28 I encourage municipalities to ensure that both their agendas and resolutions to go *in camera* identify the exception authorizing the closed meeting as well as the

general nature of the subject(s) to be discussed. In this instance, Adelaide Metcalfe provided this information.

29 The exception to the Act cited, (section 239(2)(f)) permits council to consider advice that is subject to solicitor-client privilege in a closed session.

30 Solicitor-client privilege is a protection that applies to communications between a lawyer and his or her client that: (a) entails the seeking or giving of legal advice; and (b) which is intended to be confidential by the parties.[1] It is intended to ensure that a client will be able to speak freely to his or her lawyer without fear that what they say will be disclosed.[2]

31 In this circumstance, the client is the municipality. Therefore, in order to qualify for this exception the privilege must not have been waived by the municipality, either by voluntarily or inadvertently revealing the privileged communications or advice to outside third parties.

32 While the evidence surrounding this meeting is conflicting, I am satisfied that any portion of the meeting that involved only members of council and staff discussing the municipal solicitor's advice would fall within the cited exception for solicitor-client privileged communications.

33 However, the portion of the meeting that was attended by the representatives of Strathroy Gateway does not satisfy the solicitor-client exception to the Act as the disclosure of legal advice the municipality had received from its lawyer to Strathroy Gateway constituted a waiver of the solicitor-client privilege.[3] The exception therefore did not apply to this portion of the meeting.

34 There is no exception allowing council to meet behind closed doors to negotiate agreements with third parties. Consequently, the portion of the closed meeting that Strathroy Gateway attended violated the Act.

35 Voting is only permitted in closed session for procedural matters or for giving direction to officers, employees or agents. Council must ensure any decisions made in closed session are not only properly the subject of closed session voting,

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[1] *Solosky v. The Queen*, [1980] 1.S.C.R. 821, at pg. 837.
[2] *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46.
[3] Sopinka, Lederman, Bryant, *The Law of Evidence of Canada* (Butterworths, 1999) at p. 756-7.

but also properly recorded. While we were advised that council did not vote during the closed session on July 25, 2012, the motion that followed in open session suggested a consensus may have been reached *in camera* about amendments to the Site Plan Agreement.

36 The members of council interviewed could not provide a precise description as to what had been agreed upon or how, although some indicated that consensus had been reached as to the terms of the site plan agreement and an informal direction had been given to staff to revise the draft agreement accordingly. Without a complete record containing a formal resolution, it is very difficult for either a closed meeting investigator or members of council to identify exactly what occurred and to review whether or not it was in accordance with the provisions contained in the Act.

August 1, 2012 meeting

37 On August 1, 2012 a special council meeting was held in the basement of the Adelaide Metcalfe municipal office at approximately 9:30 a.m. The main council chamber was not available because it was being used by the Township's auditors.

38 The Clerk stated that no public notice of this meeting was provided and that no agenda was prepared. The Clerk advised that these steps had not been taken because she initially understood that there would not be a council meeting, but only a meeting between the Mayor and herself.

39 The Clerk stated she had received notice from Strathroy Gateway late on July 31, 2012 that it would be executing the site plan agreement that same day and then sending it onto the Township to be signed. The Mayor similarly stated that he received notice of the need to sign the site plan agreement on July 31, 2012.

40 The Mayor subsequently decided that all of council should attend the meeting. Ultimately, all members of council but one attended, along with the Clerk.

41 The issue of notice was raised before the meeting began and one member of council posted information about the meeting on his Twitter and Facebook accounts. The meeting proceeded without formal notice having been provided.

42 The purpose of the meeting was for the Township to execute the site plan agreement between the Township and Strathroy Gateway.

43 The Clerk and council attendees advised that this matter could not have waited for a regular council meeting because of time pressures felt by the developer, including finalizing negotiations with financiers and wanting to commence construction before fall and the arrival of poor weather.

44 The representatives of the developer stated that Strathroy Gateway wanted the site plan agreement signed as soon as possible for the purposes of securing financing, scheduling, and to assist in fulfilling its commitment to the development's tenants.

45 The minutes do not record any motion to go *in camera*. The Mayor stated that he believed he made such a motion, citing the solicitor-client privilege exception provided in the Act. Two members of council and the Clerk said that the meeting had been entirely open while one attendee could not recall.

46 All who were interviewed agreed that the meeting was no longer than the 15 minutes recorded in the minutes. They also all agreed that the only business was a motion to authorize the Mayor and Clerk to sign the site plan agreement on behalf of the Township. Following this vote, the site plan agreement was signed and the meeting concluded.

Analysis

47 Pursuant to the Township's procedure by-law, where a special meeting is called: (a) it may not occur any sooner than 24 hours after the Mayor summons such a meeting or the majority of council petitions for a special meeting; and (b) the Clerk shall provide notice of the special meeting immediately following receipt of the summons or petition.

48 Based on the evidence of the Clerk and the Mayor, 24 hours did not pass between the Mayor's calling of a special meeting and the meeting on August 1, 2012. Further, public notice of the August 1, 2012 meeting was not provided, nor did council exercise the option of the curative provision that allowed the 24 hour period to be altered or waived, as provided for in the procedure by-law.

49 In light of the lack of notice and failure to comply with the procedure by-law, the relative urgency of the matter discussed is immaterial. Nonetheless, it should be pointed out that there was no evidence provided that the Township would have been substantively prejudiced by providing 24 hours notice of the meeting.

50 By not providing any public notice of the August 1, 2012 meeting, the Township, in effect, closed the door to this meeting and did not allow the public the chance to attend. Whether or not council considered itself *in camera* had no impact on the fact that this was a secret meeting.

51 In any event there was no basis for the August 1, 2012 meeting to be closed to the public. No evidence was provided of any solicitor-client advice being discussed and there was no evidence to support the application of any of the other exceptions to the open meeting provisions contained in the Act. Accordingly, the August 1, 2012 meeting was held in violation of the open meeting provisions of the Act.

August 13, 2012 meeting

52 On August 13, 2012 council convened for a regularly scheduled meeting. Notice of the meeting was provided and the agenda stated that there was no closed session scheduled for the meeting.

53 In the course of investigating this meeting we reviewed, amongst other things, the video recording of the open portion of the meeting.

54 During the course of the meeting the Clerk presented reports on a variety of issues, including council's powers under the *Green Energy Act* and a committee's review of quotes for the video recording of council meetings.

55 One councillor took issue with these reports and expressed dissatisfaction with the work of the Clerk. These comments were professional in nature, but did detail his frustration with the processes followed by the Clerk and his view that she had not done the work requested.

56 For her part, the Clerk questioned the councillor's attitude in his participation in the committee considering the issue of video recording. Another councillor brought a motion to go *in camera* with the following resolution:

> Resolved that Council move to "In Camera Session" to discuss personnel matters.

57 This resolution passed and the meeting moved into a closed session. In attendance were all members of council, the Clerk, the Deputy Clerk, and three other staff members.

58 The Township's procedure by-law does not expressly contemplate entering into an unplanned *in camera* session mid-meeting. The applicable procedure by-law provision appears to be:

> 5.8 Items received after the agenda have been prepared shall be added to the agenda by a resolution from Council, as urgent matter(s) requiring immediate action or attention and may include time sensitive material.

59 No motion to add a closed session to the agenda was considered on August 13. The Clerk stated that any matters to be added were normally added at the beginning of a meeting, but that this procedure could not be followed in this case because no one knew at the beginning of the meeting that a need for a closed meeting would arise.

60 All members of council and staff interviewed stated that it was highly unusual to go into a closed session in this fashion and that it either did not happen very often or had never happened in their experience. All attendees believed that a closed meeting was required in these circumstances.

61 All attendees also reported that, during the closed meeting there were discussions of a personal matter involving an identifiable staff member. Further, there were discussions about the need for council to work together with staff. No attendee recalled any vote occurring in the closed session, however we were advised that an agreement had been reached.

62 Following its return to open session council unanimously passed a motion resolving "that action be taken as discussed on personnel issues".

Analysis

63 Notice of the closed session was not provided in advance of August 13 as the closed session was neither planned nor anticipated.

64 While the addition of a closed session mid-meeting was not expressly mentioned in the procedure by-law there would appear to be no reason why it would not have been possible for council to comply with the by-law by passing a resolution mid-meeting to add a closed session item to the agenda.

65 In addition, the Act requires that before holding a closed session, a resolution must be passed in open session stating the fact that a closed meeting will be held as well as the general nature of the subject matter to be considered. (s. 239(4)). Generally, such resolutions should provide meaningful information about the issue to be discussed, subject to confidentiality concerns.

66 In this instance, the motion does not refer to any particular exception to the open meeting provisions of the Act. Based on the evidence it is apparent that the exception relied upon was that of "personal matters about an identifiable individual, including municipal or local board employees" (s. 239(2)(b)).

67 Provided the procedural requirements have been met, council is permitted to discuss matters *in camera* under the personal matters about an identifiable individual exception.

68 The Act does not define "personal matters." However, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* contains a similar phrase – "personal information" – that is defined. While the definition of "personal information" in *MFIPPA* does not dictate how the phrase "personal matters" in the *Municipal Act* should be interpreted, it does provide a useful reference point.

69 Section 2(1) of *MFIPPA* defines "personal information" as follows:

i. "personal information" means recorded information about an identifiable individual, including, in part:

- the personal opinions or views of the individual except if they relate to another individual,
- the views or opinions of another individual about the individual, and

- the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

70 A 2007 decision of the Information and Privacy Commissioner[4] noted that in order to qualify as personal information, the information "must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official, or business capacity will not be considered to be 'about' the individual." This decision also stated that information relating to an individual in a professional capacity "may still qualify as personal information if the information reveals something of a personal nature about the individual."

71 The Commission's adjudicator found that some of the information in question did qualify as "personal information" based on the fact that it included "an examination of identifiable individuals' job performance, which has been found to be 'personal information.'" The adjudicator noted:

> Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information.

72 Therefore, discussion of the performance of a Township employee fell within the personal matters exception.

73 However, we also heard evidence there were discussions about how council and staff could better work together going forward and about how issues between staff and council could be more effectively raised. While it is perhaps understandable that council would not want such a sensitive discussion to occur in open session, this subject matter does not fall under any of the exceptions to the open meeting requirements enumerated in the Act. As such, this portion of the meeting was closed contrary to the Act.

[4] Order MO-2204; (Town of Aylmer) (June 22, 2007)

74 Further, while no attendee could recall a vote occurring, the motion that followed in open session suggested that a course of action had been agreed upon, whether by formal vote or otherwise, in closed session. This understandably raised suspicions in the public that council had engaged in decision-making behind closed doors.

Record-keeping practices

75 In accordance with s. 239(7) of the *Municipal Act*, a municipality is required to record, without note or comment, all resolutions, decisions and other proceedings at its meetings.

76 During our investigation, there was concern regarding the level of detail contained in the municipality's closed meeting minutes. Amongst other things, the minutes did not: (a) make clear when the third party attendees arrived at the July 25 meeting; (b) record the details of what was apparently agreed to at the July 25, meeting; (c) record the irregular location of the August 1 meeting; (d) record any information about the contents of the discussion between council and staff at the August 13 meeting; and (e) record the start and end times of the August 13 closed session.

77 Ideally, a written record of a closed meeting should include reference to:

- where the meeting took place;
- when the meeting started and adjourned;
- who chaired the meeting;
- who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;
- whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- any motions, including who introduced the motion and seconders; and
- all votes taken, and all directions given.

78 While the Act prohibits "notes or comments" from being included in the official record, this does not mean that the subjects discussed in a meeting should not be referred to. The various substantive and procedural items that were discussed at a meeting **should** be recorded. The requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the

municipal meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government.

79 In the interests of transparency, a number of Ontario's municipalities audio record or allow for the broadcast of their open meetings. This is a sound and reasonable approach as it helps to ensure that there is a clear, comprehensive and accessible meeting record. As the Township currently records its open meetings it therefore has the means and ability to record its closed meetings as well. I urge the Township to adopt this practice for both its open and closed meetings.

80 Several jurisdictions in the United States require that municipal closed meetings be electronically recorded or videotaped, and others have adopted this practice to enhance the accountability and transparency of their proceedings. For example, the Illinois *Open Meetings Act* states that all public bodies must keep a verbatim record of all their closed meetings in the form of an audio or video recording[5]. Similarly, Iowa's legislation[6] requires that audio recordings be made of all closed sessions, and Nevada requires that public bodies record audio of open and closed meetings or use a court stenographer to transcribe the proceedings[7].

81 As I noted in this year's Annual Report on Closed Municipal Meetings, the practice of audio recording both open and closed meetings is in the interest of all of Ontario's municipalities. It would demonstrate they are confident they are following the rules, and would inspire community trust in the transparency and accountability of local government. It would also save time and resources for all of us. Having a clear, accessible record for closed meeting investigators to review would mean that many investigations would take no longer than the time needed to review the recording – and a great deal fewer interviews would be required. In the past few months a number of municipalities have moved forward on this issue and I look forward to this practice becoming widespread.

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[5] 5 ILCS 120/2.06

[6] Iowa Code § 21.5(4)

[7] N.R.S 241.035(4)

Reporting back in open session

82 It is not the Township's practice to report back in open session about what occurred during an *in camera* meeting, unless votes are required in open session to reflect closed session discussions.

83 I encourage municipalities to report publicly in open session on what transpires in closed session, at least in a general way. In some cases, public reporting might simply consist of a general accounting in open session of the subjects considered in closed session – similar to the information in the resolution authorizing the session, together with information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided.

Opinion

84 Our investigation confirmed that the council for the Township of Adelaide Metcalfe held illegal closed meetings on July 25, August 1, and August 13, 2012:

- At the July 25, 2012 meeting council discussed items under the solicitor-client privilege exception, which did not fit within the parameters of that or any exception.
- At the August 1, 2012 meeting, which was effectively closed to the public because there was no public notice, council discussed the site plan and signed the agreement. These subjects would not fall within any of the permitted exceptions under the Act.
- At the August 13, 2012 meeting council's discussion of an employee's performance fell within the personal matters exception under the Act. Council's discussion, however, of the overall working relationship between councilors and staff went beyond the parameters of the personal matters exception and was not permitted under any of the exceptions contained in the Act.

85 There were also a number of procedural violations that were identified including:

- There was no notice provided for the August 1, 2012 meeting.
- Twenty-four hours did not pass between the Mayor's calling of a special meeting and the meeting, which was a violation of the procedure by-law.
- There was no motion to add a closed session item to the August 13, 2012 meeting in violation of the procedure by-law.
- The motion to go *in camera* on August 13 did not provide a description of the general nature of the matter to be considered, as required by s. 239(4) of the Act.

86 During our investigation, we also observed some problematic practices, including:

- The closed meeting minutes failed to include important details necessary to determine what occurred in the closed sessions and who were the attendees.
- Motions passed in open session on July 25 and August 13 seemed to indicate that specific courses of action may have been agreed upon in closed session. While we did not find that council engaged in improper voting behind closed doors, council should ensure that any *in camera* votes and directions to staff are clearly recorded, and that they comply with the requirements of s. 239(6) of the Act.

87 I am making the following recommendations, which I hope will help council for the Township of Adelaide Metcalfe meet its legal obligations with respect to closed meetings as well as improve its closed meeting practices.

Recommendations

Recommendation 1

The Township of Adelaide Metcalfe should ensure that discussions that take place in closed session under an exception to the Act's closed meeting requirements are limited to those matters that council is permitted to discuss in closed session under the exceptions in the Act.

Recommendation 2

The Township of Adelaide Metcalfe should make every effort to comply with the notice provisions for meetings outlined in its procedure by-law.

Recommendation 3
The Township of Adelaide Metcalfe should ensure that both agendas and resolutions to go *in camera* identify the exception authorizing the closed meeting along with the general nature of the subject(s) to be discussed.

Recommendation 4
The Township of Adelaide Metcalfe should revise its procedure by-law to formalize its practice of providing notice to the public of meetings by posting the agenda on its website the Friday prior to the meeting.

Recommendation 5
In cases where an item comes to the attention of the council for the Township of Adelaide Metcalfe after the agenda is prepared, including during the course of a meeting, efforts should be made to amend the agenda in accordance with requirements of the procedure by-law.

Recommendation 6
The Township of Adelaide Metcalfe should record audio and/or video of all *in camera* meetings and store such recordings in a confidential and secure fashion for future reference.

Recommendation 7
The Township of Adelaide Metcalfe should ensure that no vote is taken at a closed meeting except in accordance with the town's procedure by-law and the Act. All votes should be clearly recorded in the minutes.

Recommendation 8
The council for the Township of Adelaide Metcalfe should follow a practice of reporting back publicly after a closed meeting generally on all matters considered *in camera*.

Recommendation 9
All members of council for the Township of Adelaide Metcalfe should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the Act and its own procedure by-law.

Report

88 My report should be made available to the public as soon as possible, and no later than the next council meeting.

André Marin
Ombudsman of Ontario